

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN E. SELLERS and DEPARTMENT OF THE ARMY,
INFORMATION SYSTEMS COMMAND, Fort Bragg, N.C.

*Docket No. 97-2254; Submitted on the Record;
Issued May 18, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she has more than a one percent permanent impairment of the left upper extremity; and (2) whether the Office of Workers' Compensation Programs properly determined appellant's pay rate.

The Board has duly reviewed the case record and finds that appellant has not established that she is entitled to a greater schedule award.

In the present case, the Office has accepted that appellant, a supply clerk/technician, sustained low back strain, cervical strain and myositis as a result of a fall on steps in the performance of her federal employment on December 11, 1989.

On March 4, 1996 appellant requested payment of a schedule award. The Office denied appellant's claim for a schedule award on January 13, 1997 on the grounds that she had not submitted the necessary medical evidence to establish that she had a ratable permanent impairment of the left upper extremity. On January 27, 1997 appellant requested that the Office reconsider her claim and appellant submitted a report from her treating physician, Dr. Richard Young, a Board-certified orthopedic surgeon, dated July 23, 1996. In his report dated July 23, 1996, Dr. Young stated that appellant's physical examination was almost normal, with good range of motion of the cervical spine, but with pain of the left shoulder on extremes of motion. He indicated that appellant had a full active range of motion of the left shoulder, with 80 degrees of internal rotation, 70 degrees of external rotation, forward elevation to 180 degrees, backward elevation 45 degrees, retained abduction of 170 degrees and adduction of 50 degrees. Dr. Young noted that he believed appellant had a chronic pain syndrome involving the left shoulder and that she had reached maximum medical improvement in 1991. He stated that, with appellant's continued chronic pain, she had a 10 percent impairment of the left shoulder based upon her pain.

Section 8107 of the Federal Employees' Compensation Act¹ provides that, if there is a permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants in the evaluation of permanent physical impairment. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.²

The Board has long held that a medical opinion regarding permanent impairment which is not based upon the A.M.A., *Guides*, the standard adopted by the Office and approved by the Board as appropriate for evaluating schedule losses, is of little probative value in determining the extent of a claimant's permanent impairment.³ Because Dr. Young's opinion regarding the degree of permanent impairment was not based upon the A.M.A., *Guides*, and was therefore of little probative value, the Office properly requested that the Office medical adviser review Dr. Young's report and determine the extent of appellant's permanent impairment pursuant to the A.M.A., *Guides*.

On March 21, 1997 an Office medical adviser reviewed the case record and stated that pursuant to the fourth edition of the A.M.A., *Guides*, 45 degrees of retained extension of the left shoulder would equal a one percent permanent impairment. The Board has reviewed both Dr. Young's physical examination findings, and the Office medical adviser's calculations pursuant to the A.M.A., *Guides*. The Office medical adviser properly determined that pursuant to figure 38,⁴ of the A.M.A., *Guides*, 45 degrees of retained extension of the left shoulder would be rounded up to a 1 percent permanent impairment of the upper extremity, and that pursuant to figure 38, appellant's retained flexion of the shoulder equaled a 0 percent impairment. Pursuant to figure 41,⁵ appellant's abduction and adduction of the left shoulder did not result in any permanent impairment, and pursuant to figure 44,⁶ appellant's internal and external rotation of the left shoulder did not result in any permanent impairment.

Regarding Dr. Young's conclusion that appellant had a 10 percent permanent impairment of the left shoulder due to myofascial pain syndrome, the medical adviser noted that pursuant to the A.M.A., *Guides*, pain which was documented and expected to be permanent could result in a permanent impairment, pursuant to page 3/9 and 3/10 of the A.M.A., *Guides*. On March 20, 1997 the Office asked that the medical adviser clarify whether under the *Guides*, a schedule award could be paid solely on the basis of pain. On March 21, 1997 the Office medical adviser responded that a schedule award could not be paid on such basis. In this regard, the Board notes that the A.M.A., *Guides* do provide for impairment of the upper extremity due to loss of function

¹ 5 U.S.C. § 8107.

² *James J. Hjort*, 45 ECAB 595 (1994).

³ *James Kennedy, Jr.*, 40 ECAB 620 (1989).

⁴ A.M.A., *Guides*, at page 43.

⁵ A.M.A., *Guides*, at page 44.

⁶ A.M.A., *Guides*, at page 45.

from sensory deficit or pain resulting from a peripheral nerve disorder.⁷ Dr. Young's general conclusions that appellant had pain, however, did not provide any of the details necessary to determine whether appellant in fact had a peripheral nerve disorder resulting in a loss of function due to pain. The Office therefore properly concluded that the record did not substantiate that appellant's pain complaints had resulted in permanent impairment.

On March 28, 1997 the Office granted appellant a schedule award for a one percent permanent impairment of the left upper extremity. The Office stated that the award would be paid at the weekly pay rate of \$386.00 for the period March 30 to April 20, 1997. The Board finds that appellant has not established that she has more than a one percent permanent impairment of the left upper extremity.

On appeal, appellant also alleges that her schedule award was paid at an improper pay rate. Appellant alleges that she should have been paid at a recurrent pay rate. The Board notes that the record documents that appellant was paid all compensation benefits at the date-of-injury pay rate of \$386.00 weekly.

Appellant returned to her regular employment on August 13, 1990. On May 2, 1994 appellant filed a notice of recurrence of disability alleging that while she had not stopped work, she had frequently missed days of work due to neck pain and headaches since August 13, 1990. On October 11, 1995 appellant filed a Form CA-7, claim for compensation claiming wage loss for the period May 18 to December 16, 1994. On November 6, 1995 the Office advised appellant that she was eligible for \$1,001.08 gross compensation which covered 117 hours of wage loss for the period May 18, 1994 to August 25, 1995. On January 28, 1997 appellant filed a claim for compensation for 78 hours of wage loss during the period September 19, 1995 to December 13, 1996. On May 8, 1997 the Office advised appellant that it had approved her claim for leave buy back for the period September 19, 1995 to December 13, 1996 for 78 hours, at a date-of-injury pay rate of \$386.00.

Under the Federal Employees' Compensation Act, compensation is based on an employee's monthly pay, which is defined under 5 U.S.C. § 8101(4) as the rate of pay at the time of injury, or the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if it recurs more than six months after an employee resumes full-time employment with the United States, whichever is the greatest. In *Johnny A. Muro*,⁸ the Board clarified that if the employee had a recurrence of compensable disability which began after the six-month period specified, the monthly pay received at the time of such recurrence was the pay to be used with respect to such alternative; to be compared with the monthly pay under the other two alternatives. In *Muro*, the Board found that even though appellant may have been disabled sporadically during the six-month period following the return to employment, the return to regular full-time employment did not have to be continuous. Appellant could claim a recurrence of disability at any time after he had worked cumulatively for the required six months in his regular full-time employment.

In the present case, while the record indicates that appellant claimed and received leave buy back for sporadic disability within six months of her return to her regular full-time

⁷ See *id.* at 46, 66.

⁸ 17 ECAB 537 (1966).

employment, the record also indicates that between 1994 and 1997 appellant was paid compensation for several hundred hours of disability and at some point in time appellant would have satisfied the six-month requirement of 8101(4). In *Muro*, the Board also noted that if appellant has one recurrence which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle appellant to a new recurrence pay rate. As appellant's schedule award was paid for the period March 30 to April 20, 1997, and as appellant may have been entitled to a recurrent pay rate sometime between 1994 and 1997, appellant's schedule award may have been paid at an improper pay rate. The Office should therefore further develop the case record as necessary to determine if appellant has a recurrent pay rate which is greater than the pay rate for date of injury.

Finally, while the Office has advised appellant that she was not entitled to a recurrent pay rate because she missed time from work only for medical evaluation, the record indicates that appellant may have missed work sporadically due to incapacity caused by the injury-related condition. The dates for which the Office authorized payment of disability benefits from 1994 to 1997 included consecutive dates, which would not appear to be for medical evaluation. Furthermore, while the Board has recognized that a recurrence of disability for pay rate purposes, does not occur on each date that appellant obtains medical evaluation,⁹ a work stoppage for medical treatment "because of residuals of the injury" which causes incapacity to work due to the injury, may constitute a recurrence of disability.

The decision of the Office of Worker's Compensation Programs dated March 28, 1997 is hereby affirmed regarding the Office's finding that appellant is not entitled to more than a one percent schedule award for permanent impairment of the left upper extremity and is set aside and remanded for further development regarding the issue of pay rate.

Dated, Washington, D.C.
May 18, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Andrew W. Eickholt*, 30 ECAB 360 (1979).